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SUPREME COURT U.S.

NO. 81-6512

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT ALTON HARRIS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state can constitutionally execute a defendant condemned at a penalty proceeding which lacks the principal procedural protections approved in Gregg v. Georgia (1976) 428 U.S. 153, et al. The California sentencing statute has no burden of proof on such fundamental issues as: fact finding, determination of whether aggravating factors outweigh mitigating circumstances, and finding beyond a reasonable doubt that death is the appropriate punishment.

2. Whether the decision in Estelle v. Smith (1981) 451 U.S. 454, requires a capital murder suspect to be advised that anything he says to a prosecution-retained psychiatrist on the evening of his arrest could be used against him at a death penalty proceeding, that the psychiatrist has been retained by the prosecution, and that the purpose of the interview is to establish the absence of possible mental defenses and character evidence for possible use by the prosecution in rebuttal at the penalty phase trial. Further, should such a suspect have a non-waivable right to consult with counsel prior to such an interview?

3. Whether petitioner is entitled to any review of his death sentence by the state high court to determine if his sentence is arbitrary, discriminatory or disproportionate to the sentence imposed on other capital-eligible defendants, particularly where the penalty hearing at which the death sentence was imposed lacked most of the procedural protections approved in Gregg.

4. Even if the state high court does not initiate its own review for arbitrariness and discrimination, whether the court must afford a capitally-sentenced defendant an

opportunity for a full hearing when he has specifically alleged Eighth and Fourteenth Amendment violations and supported the claims by a prima facie showing and offer of proof.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

ROBERT ALTON HARRIS,

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v.

STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Robert Alton Harris, respectfully prays that a writ of certiorari issue to review the order of the California Supreme Court issued on January 13, 1982, denying his petition for writ of habeas corpus after previously affirming his conviction and sentence of death on February 11, 1981.

PROCEEDINGS BELOW [1/]

The opinion of the Supreme Court of California

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1. After the denial of hearing on these issues in the California Supreme Court, petitioner secured a stay of execution on March 12, 1982 from the Ninth Circuit Court of Appeals pending resolution of his federal habeas petition filed in federal court on March 5, 1982.

affirming petitioner's conviction and his sentence of death is reported at 28 Cal.3d 935 (1981). The order of the Supreme Court denying petitioner's timely petition for writ of habeas corpus is attached as Appendix A to this petition.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1257(3) and Rule 17 of the Rules of this court.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Eighth Amendment provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in part:

" . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

A. The 1977 Legislative Enactments Which Are Applicable to Petitioner's Case.

Penal Code, section 190.2 provides:

"The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true.

* * *

"(e) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists.

* * *

"(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

* * *

"(i) Robbery in violation of Section 211.

"(ii) Kidnapping, in violation of Section 207 or Section 209 . . .

* * *

"(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree."

"Penal Code, Section 190.3 provides:

"If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force of violence, and the defendant's character, background, history, mental condition and physical condition.

* * *

"In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.

"(h) The age of the defendant at the time of the crime.

"(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

"After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole."

STATEMENT OF THE CASE

The petitioner, Robert Alton Harris, was convicted after a jury trial of the offenses of kidnapping, robbery and first degree murder of John Mayeski and Michael Baker. The jury also found special circumstances existed as to each of the homicides of which petitioner was convicted (more than one first degree murder [California Penal Code § 190.2(c)(5)]: each murder willful, deliberate, premeditated and committed during the commission of kidnapping and robbery [California Penal Code § 190.2(c)(3)(i-iii)].)

At the penalty phase the jury fixed the penalty at death. On automatic appeal, the California Supreme Court affirmed and this court denied a petition for certiorari thereafter. Petitioner then brought a state petition for

writ of habeas corpus attacking his conviction on federal constitutional grounds including all issues raised in this pleading. On November 24, 1981, the Superior Court of San Diego summarily denied the petition, likewise the intermediate Court of Appeal on November 25, 1981, and finally the California Supreme Court denied the petition on January 13, 1982.

STATEMENT OF FACTS[2/]

In the penalty phase of petitioner's trial, he took the witness stand and admitted the killings for which he was on trial. Petitioner had earlier contended in the guilt phase of his trial that these killings were actually committed by his brother, and that he had confessed to them in order to protect his brother. In his penalty phase testimony, petitioner retracted his earlier exculpatory testimony, but testified that he felt remorse for his actions. In support of this contention, a jail guard, Deputy Mendoza, was called to the witness stand to recount petitioner's expressions of remorse to him following an apparent suicide attempt.

In rebuttal in the penalty phase, the prosecution introduced the testimony of Dr. Wait Griswold, a psychiatrist who had examined petitioner in the early morning hours of July 6, 1978, the day of the arrest. Griswold testified that based upon his interview with petitioner, and a review

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2. For purposes of this petition, petitioner adopts the statement of facts in the opinion of the California Supreme Court affirming his death judgment on automatic appeal (28 Cal.3d 935).

of records relating his prior adjustment to incarceration, petitioner suffered from a personality disorder which the doctor termed a "sociopathic" or antisocial personality (RT 4646-4651). According to Griswold, one of the manifestations of the personality disorder which petitioner exhibited was a lack of remorse for his actions. Further, Griswold testified that he would expect a person possessing such a personality disorder to feel remorse or concern for his having been apprehended or convicted of the killings, but not true remorse for the victims. (RT 4646, 4655, 4646-4656).

Griswold's damning testimony concerning his analysis of petitioner's personality disorder, and the manifestation of that disorder, were, by his testimony, based substantially upon the statements made by petitioner to him in the early morning hours of July 6, 1978, following his arrest at approximately 1:20 p.m. on July 5, 1978. As of the time of the interview with Dr. Griswold, petitioner had already been interrogated concerning his participation in the killings at approximately 6:30 p.m. by members of the San Diego Police Department Homicide Team investigating the crime. (RT 3071-3072). In this interview, which lasted approximately one hour and forty minutes, petitioner, after having been advised of his rights per Miranda, admitted his guilt to the investigating officers. Although petitioner was again warned of his rights per Miranda by a police officer who escorted him to Griswold's office prior to the psychiatrist's interview with petitioner, petitioner was not informed and did not understand that the primary purpose of this interview was fundamentally different from that which had

preceded it and in which he had confessed his guilt. Specifically, petitioner was not aware at this time the offenses to which he had previously confessed were capital crimes. Moreover, petitioner was not advised nor was he aware that his statements to the psychiatrist could and would be used against him in the penalty phase of a capital trial by the prosecution in seeking to have the death penalty imposed upon him.

ARGUMENT

I

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT NEGLECTED TO INSTRUCT THE JURY THAT THE DEATH PENALTY COULD BE IMPOSED ONLY IF THEY WERE CONVINCED BEYOND A REASONABLE DOUBT THAT DEATH WAS THE APPROPRIATE PUNISHMENT

"Given the gravity of the decision to be made at the penalty phase, the state is not relieved of the obligation to observe fundamental constitutional guarantees." (Estelle v. Smith (1981) 451 U.S. 454, 68 L.Ed.2d 359.) One of those guarantees is the due process requirement that a criminal proceeding contain procedural devices to minimize the risk of error. Most important of those safeguards is the "burden of proof," which, in both its allocation and its certainty, is a "fundamental assessment of the comparative social costs of erroneous factual determinations." (In re Winship (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368].) Since the consequences of the penalty decision can be so grimly final, the jury must be told that death can be imposed only if they are convinced beyond a reasonable doubt that it is the appropriate penalty. (U.S. Const., Amend. XIV; Cal. Const., art. I, § 7, subd. (a); art. I, § 15; Speiser v. Randall (1958) 357 U.S. 513 [2 L.Ed.2d 1460]; In re Winship, supra; Santosky v. Kramer 50 USLW 4333(3/24/82).)

The Court has not addressed this question. The California Supreme Court rejected the claim that the Eighth Amendment requires a penalty burden of proof. (People v. Frierson (1979) 25 Cal.3d 142, at p. 180.) The Speiser-Winship due process roots for a burden of proof are

analytically different than the Eighth Amendment analysis, however, and only California Chief Justice Bird has expressed an opinion on the distinct due process issue. (People v. Jackson (1980) 28 Cal.3d 264, 356-357 [dis.opn.].)

The requirements of due process relative to a standard of proof depend upon the significance of what is at stake and the interest in reducing the likelihood of erroneous results. (In re Winship, supra, 397 U.S. 358, 363-364.) An assessment of these factors in a penalty phase of a capital trial compels the conclusion that due process requires the state to bear the burden of proving beyond a reasonable doubt that death is the appropriate penalty.[3/]

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3. If the jury were instructed relative to what constituted aggravating and mitigating circumstances, the state could meet its burden by proving specific aggravating factors exist beyond a reasonable doubt (see Gregg v. Georgia (1976) 428 U.S. 153; Jurek v. Texas (1976) 428 U.S. 262) or possibly if at least the aggravating factors outweighed mitigating factors (see Proffitt v. Florida (1976) 428 U.S. 242). The three capital sentencing schemes upheld by this Court are in sharp contrast to California's law. The Georgia law approved in Gregg required the jury to find at least one aggravating circumstance beyond a reasonable doubt. (428 U.S. at p. 161.) Texas asked its jury to find the truth of three specified penalty questions beyond a reasonable doubt. (Jurek v. Texas, supra, 428 U.S. at p. 268.) And in Florida, the sentencer was at least told to determine whether the mitigating circumstances outweighed the aggravating. (Proffitt v. Florida, supra, 428 U.S. at pp. 248-249.) In contrast, the California statute provides for no burden of proof and despite

[Fn. continued]

The allocation of a burden of proof symbolizes the significance of what is at stake. In this sense, it is a statement of belief that the more serious the consequences of the decision being made, the greater the necessity that the decisionmaker reach "a subjective state of certitude" that his decision is appropriate. (In re Winship, supra, 397 U.S. 358. 364.)

A recent case suggests the Fourteenth Amendment requires a reasonable doubt standard in the penalty phase: "Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.'" (Bullington v. Missouri (1981) 451 U.S. 430, 68 L.Ed.2d 270.)[4/]

Petitioner's jury was not told how to weigh the aggravating and mitigating evidence nor were they given any degree of proof for aggravating factors. They determined petitioner's ultimate fate without even the degree of certainty used to decide cases in Small Claims Court. If the state must satisfy the reasonable doubt standard before committing someone to a mental institution or convicting him of vagrancy, then it must meet the same standard when it wishes to use its gas chamber. The statute is constitutionally lacking for not requiring the reasonable doubt standard at the penalty phase.

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petitioner's objection, no such instruction was given. Petitioner in fact requested an instruction that the People had the burden of proof beyond a reasonable doubt to show death was the appropriate punishment(RT 3934-3946).

4. The implications of Bullington are that if the state treats a penalty hearing as a full-blown criminal trial, then constitutional procedures such as double jeopardy (and burden of proof) attach to the proceeding.

II

THIS COURT'S RECENT DECISION IN ESTELLE V. SMITH (1981) 451 U.S. 454 REQUIRES: THAT A SUSPECT IN A CAPITAL CASE WITHOUT COUNSEL BE ADVISED THAT ANYTHING HE SAYS TO A PROSECUTION-RETAINED PSYCHIATRIST MAY BE USED AS EVIDENCE TO CONVINCE A JURY TO PUT HIM TO DEATH; AND FURTHER THAT THE DECISION TO UNDERGO SUCH AN EXAMINATION BE MADE ONLY AFTER THE DEFENDANT CONSULTS COUNSEL

Estelle presented the question whether in capital cases the Fifth Amendment requires a suspect to be advised prior to a pre-trial psychiatric examination that he has a right to remain silent and that any statement he makes may be used against him "at a sentencing proceeding." (Id. at 68 L.Ed2d 368.) Estelle answers the question in the affirmative.

Like the defendant in Estelle, petitioner "did not voluntarily consent to the pre-trial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, . . ." (id. at 372, emphasis added). Too, "he was given no indication that the compulsory[5/] examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death," and not afforded an opportunity to consult with counsel. Without this essential information, petitioner could only assume that the purpose

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5. In petitioner's case the psychiatric examination by an expert on retainer to the prosecution was conducted on the night of his arrest outside the judicial process at a time when petitioner was unrepresented. Petitioner had not yet been arraigned upon the charges and had not had an attorney

of his interview with Dr. Griswold was for the purpose of helping him. He had just confessed to the police and could hardly assume that an additional confession to a psychiatrist would cause him further detriment. In our culture, doctors heal, treat, mend and take an oath not to harm patients. This is what petitioner believed when he saw Dr. Griswold. The context of the meeting with Griswold was "I want to help you." The unspoken reality was "I very well may assist the prosecution in killing you."

This is the very evil Estelle seeks to preclude -- a defendant should not be the deluded instrument of his own destruction (id. at 369).[6/]

While petitioner in the instant case was afforded a standard Miranda admonition prior to speaking with Dr. Griswold, he "did not voluntarily consent to the pre-trial psychiatric examination after being informed of his right

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[Fn. 5 continued]
appointed to represent him as of this stage in the proceedings. Thus, he "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." (Estelle v. Smith, 68 L.Ed.2d 374). In Estelle, the psychiatric interview was court ordered.

6. Professor Welsh White recently reviewed Estelle (Waiver and the Death Penalty: The Implications of Estelle v. Smith (1981)72 Jour. Crim.L. & Criminology (1522 at 1537)) and found a substantial policy basis for the court's implicit holding that

> "If the defendant's statement is to be used against him in the penalty phase of a capital trial, then knowledge that the statement may be used for this purpose should be essential to a valid waiver under Miranda. A capital defendant who lacks such knowledge will not be aware of the true nature of the adversary interests involved."

to remain silent and the possible use of his statements . . . ." Estelle v. Smith, 68 L.Ed.2d 372.[7] Thus, his waivers of his right to remain silent and to the assistance of an attorney were not knowing and intelligent. In order to be constitutionally valid. a waiver "must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends . . . 'upon the particular facts and circumstances surrounding [each] case . . . .'" Edwards v. Arizona, 68 L.Ed.2d 378, 385 (1981).

Assuming rights waivers can be knowingly and intelligently taken from a defendant in similar situations[8]

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7. The American Psychiatric Association (APA) recognizes the compelling need for total disclosure to a criminal suspect of the nature and purpose of a psychiatric examination. In its brief to this Court in Estelle v. Smith, APA noted the ethical requirements in such a context. In a capital case, APA deems it a minimum that the defendant be informed of the nature and purpose and lack of confidentiality of the examination. Further, APA deems it a minimum that the psychiatrist identify his position and role to the defendant. See Amicus Brief, page 30, n. 20.

8. Can such a waiver of counsel be made where the prosecution seeks an ex parte psychiatric interview with a capitally accused suspect? As this Court noted in Estelle v. Smith, supra, at 68 L.Ed.2d 374:

> "Because '[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege,' the assertion of that right 'often depends upon legal advice from someone who is trained and skilled in the subject matter.' [Citations.] As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is 'literally a life or death matter' and

[Fn. 8 continued]

the defendant must be informed of the biases of the psychiatrist, the purpose of the interview (investigating potential mental defenses as well as character) and informed that the doctor's opinion may be used against him at the sentencing proceeding. This was not done in the instant case.

Since petitioner's waiver was not a "knowing and intelligent relinquishment or abandonment of a known right or privilege," his statements to Griswold, which substantially contributed to the psychiatrist's opinion and were used to condemn him to death, were not voluntary, and should have been suppressed.

[Fn. 8 continued]

> is 'difficult . . . even for an attorney' because it requires 'a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing.' 602 F.2d, at 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.' [Citations.]"

Under the circumstances of such interviews, who is it that will provide the advice as to the psychiatrist's biases and predelictions, the amount of evidence available against the defendant or the possible sentencing strategy? The police? The hand-picked prosecution psychiatrist conducting the interview with the obvious purpose of defeating potential diminished capacity and insanity defenses? Hardly. True consent and knowing waivers are most unlikely where the psychiatrist is selected because of his bias and the context of the interview is seductively misleading, if not an outright fraud.

III

PETITIONER HAS NEVER BEEN AFFORDED REVIEW OF HIS DEATH SENTENCE BY ANY CALIFORNIA COURT IN ORDER TO INSURE THAT THE PENALTY OF DEATH IS PROPORTIONATELY APPLIED AS REQUIRED BY GREGG V. GEORGIA, SUPRA, AT 205; PROFFITT V. FLORIDA, SUPRA, AT 251; JUREK V. TEXAS, SUPRA, AT 276. IN ANY EVENT, HIS SENTENCE OF DEATH IS ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

The California death legislation under which petitioner was sentenced failed to provide for meaningful and effective proportionality review and thus invited arbitrary and discriminatory imposition of the death penalty. In an attempt to remedy this glaring defect in the statutory scheme under which petitioner was convicted and sentenced to death, the California Supreme Court in People v. Frierson, supra, stated: "We stand fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated by the high court." 28 Cal.3d at 317. This statement in the plurality opinion in Frierson, supra, does not commit the Supreme Court of California to engage in any kind of proportionality review. Nor is the review described in the lead opinion constitutionally adequate to insure that the death penalty in a particular case is imposed in a consistent and rational manner.

What the lead opinions in Jurek, supra, Proffit, supra, and Gregg, supra, contemplate is a prompt judicial-

review of the sentencing decision to insure that the death sentence in a particular case is consistent with other sentences imposed under similar circumstances. (See, Proffitt, supra, at 251, 253; Gregg, supra, at 204-206; cf. Woodson v. North Carolina, 428 U.S. 280, 303, n. 38.) True proportionality review does not contemplate alone an inquiry into the sufficiency of the evidence to support a death sentence, which the Frierson plurality appears to consider an adequate protection against disproportionate punishment. Indeed, William Henry Furman's death judgment would have been upheld if this court's review had been limited to the scope delineated by the Frierson plurality. Rather, what is required to insure rational consistency is appellate review in which the court may compare similar cases in which the death penalty could have been or was actually imposed. In making the comparisons, the court must look to the severity of the offense and the background and characteristics of the individual defendants to determine whether a death sentence in any particular case has been imposed in an arbitrary or discriminatory manner.

IV

EVEN IF THE CALIFORNIA SUPREME COURT IS NOT OBLIGATED TO INITIATE ON ITS OWN REVIEW FOR ARBITRARINESS AND DISCRIMINATION, PETITIONER SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY FOR FULL HEARING WHEN HE RAISED SPECIFIC CLAIMS OF ARBITRARINESS AND DISCRIMINATION AND SUPPORTED THEM BY A PRIMA FACIE SHOWING AND OFFER OF PROOF

Petitioner pleaded with great specificity that his death sentence was imposed in an arbitrary, discriminatory and disproportionate manner, in violation of his Eighth and Fourteenth Amendment rights. These claims were supported by a prima facie showing, an offer of further proof, and a request for a hearing to present such proof in the state court. Petitioner's allegations, uncontroverted by any responsive pleading, were dismissed without a hearing.

It is a violation of the federal due process guarantee for a state court to foreclose any opportunity to be heard on a federal constitutional claim which was timely raised. (See Townsend v. Sain (1963) 372 U.S. 293, 312-3); Guice v. Fortenberry (5th Cir. en banc (1981) 661 F.2d 496, 506-8 (reversing and remanding for evidentiary hearing to determine petitioner's allegation regarding racial discrimination in grand jury foreman selection); Grigsby v. Mabry (8th Cir. 1980) 637 F.2d 525, 528-9 (remanding for evidentiary hearing to determine petitioner's allegation that "death qualification" of jurors deprived him of a fair trial).

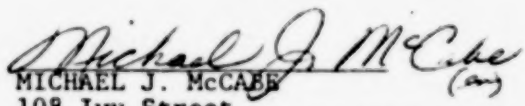
In sum, the state courts must either initiate appellate review regarding arbitrariness and discrimination in the imposition of the death penalty, or provide a forum for an individual defendant to present and prove such claims. The California Supreme Court has done neither.

CONCLUSION

For the foregoing reasons, the petitioner respectfully urges this Court grant his petition and issue a writ of certiorari.

DATED: April 8, 1982

Respectfully submitted,



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SUPREME COURT
FILED
JAN 18 1982
LAURENCE P. GILL, Clerk
Deputy

ORDER DENYING WRIT OF HABEAS CORPUS

Criminal No. 22380

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In re ROBERT ALTON HARRIS

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

The stay of execution heretofore granted December 9, 1981, is vacated.

Bird, C.J., and Kaus, J., are of the opinion that the respondent should be ordered to show cause why the relief prayed for should not be granted.

Bird

Chief Justice

J. 81-6512

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

IN THE MATTER OF THE APPLICATION OF	)	
ROBERT ALTON HARRIS	)	HC No. 5841
FOR A WRIT OF HABEAS CORPUS	)	ORDER DENYING WRIT

Having read and considered the petition of ROBERT ALTON HARRIS for a writ of habeas corpus and good cause appearing, it is hereby ordered that the above-entitled action be, and the same is hereby denied for the following reasons:

(1) Statements to psychiatrist Dr. Griswold

Petitioner contends his statements to Dr. Griswold were involuntary and obtained without waiver of counsel. The contention should have been raised upon petitioner's appeal. Petitioner has presented insufficient justification for his failure to present such argument on appeal. In re Walker, 10 Cal.3d 764, 773 (1974). Furthermore, petitioner's contention is without merit.

(2) Testimony of Dr. Griswold

Petitioner complains Dr. Griswold's testimony in which he concluded petitioner was a "sociopath" was irrelevant, did not comply with the notice provisions of Penal Code section 190.3, and was unreliable. Relevancy and compliance with notice requirements have already been concluded to have been met by the California Supreme Court in petitioner's direct appeal. See People v. Harris, Crim. No. 20888, 28 Cal.3d 935, 961 (1961). As to reliability, petitioner presents insufficient facts justifying failure to present the issue on direct appeal. Even if such justification is met, the contention has no merit.

(3) Special Circumstances

Petitioner argues the three special circumstances found to be true with respect to each victim were unlawfully "accumulated,"

petitioner presents insufficient justification for failure to raise the argument on appeal. Even if such justification is met, the contention has no merit.

(4) Pretrial publicity

Petitioner seeks reconsideration of the decision rendered by the California Supreme Court in People v. Harris, Crim. No. 20888, 28 Cal.3d 935 (1981) regarding prejudicial pretrial publicity in light of two subsequent decisions, Martinez v. Superior Court, 29 Cal.3d 574 (1981) and People v. Williams, 29 Cal.3d 392 (1981). The decisions do not affect the decision in People v. Harris, supra.

(5) Exclusion of jurors due to views on death penalty

Petitioner argues the trial court unlawfully excused jurors due to their inability to return a verdict of death. Further, petitioner complains the trial court failed to instruct prospective jurors of their duty to set aside personal views in the decision whether they could return such a verdict. The California Supreme Court has already denied petitioner's arguments both upon direct appeal in People v. Harris, supra, at 960, and by habeas corpus.

(6) Exclusion of evidence by the trial court

Petitioner contends the trial court erred in refusing to allow admission of evidence relating to the value of the death penalty in deterrence, the penological aspects of life without the possibility of parole, and the inhumanity of the actual process of execution. With respect to the first two areas, petitioner has failed to present sufficient justification for not raising the issue on appeal. Even if such justification is met, the contentions have no merit. With regard to the refusal to allow evidence of the execution process, the California Supreme Court has already denied petitioner's argument upon direct appeal in People v. Harris, supra, at 962.

(7) Instruction of burden of proof in penalty decision

Petitioner complains the trial court failed to instruct the penalty jury that it must be satisfied beyond a reasonable doubt that death is the appropriate penalty. The California Supreme Court has already denied petitioner's argument upon direct appeal in People v. Harris, supra, at 964.

(8) Constitutionality of death penalty statute

Petitioner argues the death penalty statute is unconstitutional due to the failure of its provisions to require rational and consistent application of the penalty of death. Further, the statute is argued to lack provisions insuring meaningful review of the decision to impose death. The California Supreme Court has already denied petitioner's argument upon direct ap-

peal in People v. Harris, supra, at 964.

(9) Constitutionality of death penalty statute

Petitioner further complains the death penalty statute is unconstitutional due to its failure to prevent application of the death penalty in an arbitrary and/or capricious manner. The California Supreme Court has already denied petitioner's argument upon direct appeal in People v. Harris, supra, at 964. Petitioner's request for discovery of those cases in which death was not imposed (special circumstance cases) for purposes of proportionality review is denied.

(10) Psychiatric testimony of Dr. Griswold relating to bias/prejudice

Finally, petitioner contends Dr. Griswold presented an untrue image of his bias/prejudice toward the prosecution when he testified that he is "called on" approximately 1/2 of the time by the defense and approximately 1/2 of the time for the prosecution. Petitioner has failed to present sufficient justification for not raising the issue on appeal. Even if such justification is met, the contention has no merit.

DATED: NOV 24 1981

JUDGE OF THE SUPERIOR COURT

DUPLICATE FILE: CR 44135

COURT OF APPEAL - FOURTH DIST.
FILED
NOV 25 1981
ROBERT L. FORD, Clerk
DEPUTY CLERK

FOURTH APPELLATE DISTRICT

DIVISION ONE

IN RE: ROBERT ALTON HARRIS.

ON

HABEAS CORPUS.

4 CRIM. 13691

San Diego County No. CR 44135

THE COURT:

The issues presented by the petition for writ of habeas corpus filed here November 25, 1981, could have been raised on petitioner's appeal to the Supreme Court, published as People v. Harris, 28 Cal. 3d 935. This Court is not privy to the record which was before the Supreme Court and has no information whether or to what extent the Supreme Court may have already considered or rejected these contentions. Accordingly were we to accept original jurisdiction here we might impermissibly infringe upon the Supreme Court's appellate jurisdiction over this case, which, because of imposition of the death penalty, is exclusive. (Cal Const Art VI Sec. 11) The petition is therefore denied.

Acting Presiding Justice

cc:
County Clerk, San Diego County, 220 West Broadway, San Diego, CA 92101

Office of the Attorney General, 110 West "A" Street, Suite 600, San Diego, CA 92101
MICHAEL J. MC CABE, ESQ., 108 Ivy St., San Diego, CA 92101

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NO. 81-6512

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT ALTON HARRIS,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

MOTION FOR LEAVE TO PROCEED ON PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

MICHAEL J. McCABE
108 Ivy Street
San Diego, California 92101
Phone: (714) 231-1181

Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

ROBERT ALTON HARRIS,	)
	)
Petitioner,	)
	)
v.	)
	)
STATE OF CALIFORNIA,	)
	)
Respondent.	)
	)

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to 18 U.S.C. section 3006A(d)(6) and Rule 46 of this Court, the petitioner, Robert Alton Harris, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the State of California, without prepayment of fees or costs and to proceed in forma pauperis.

Petitioner further requests that an attorney, Michael J. McCabe, be appointed to represent him in this Court. The declaration of petitioner is attached hereto and made a part hereof.

Respectfully submitted,

Dated: April 8, 1982

MICHAEL J. McCABE
108 Ivy Street
San Diego, California 92101
Phone: (714) 231-1181

Attorney for Petitioner

DECLARATION OF ROBERT ALTON HARRIS
IN SUPPORT OF MOTION TO PROCEED IN
FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss
COUNTY OF MARIN)

I, ROBERT ALTON HARRIS, declare the following to be true and correct under penalty of perjury:

1. I am the petitioner in the petition for writ of certiorari which accompanies this motion.

2. I was accorded appointed counsel to represent me both in the Superior Court of the State of California and on my automatic appeal to the Supreme Court of California.

3. I am completely indigent, and have no funds or assets with which to pay the docket fee or any costs associated with this petition.

4. If my petition for writ of certiorari is granted, I respectfully request that the court appoint Michael J. McCabe, Savitz & McCabe, 108 Ivy Street, San Diego, California 92101, (714) 231-1181, to represent me.

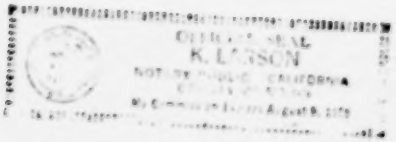
Executed on February 10, 1982 at San Quentin, California.

Robert Alton Harris
ROBERT ALTON HARRIS

On 2-10-82 before me, the undersigned, a Notary Public in and for said State, personally appeared Robert Alton Harris known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

NOTARY PUBLIC



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IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1981

No. 81-6512

ROBERT ALTON HARRIS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General--Criminal Division
DANIEL J. KREMER,
Assistant Attorney General
HARLEY D. MAYFIELD,
Deputy Attorney General
MICHAEL D. WELLINGTON
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (714) 237-7666

Attorneys for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-6512

ROBERT ALTON HARRIS, Petitioner, v. STATE OF CALIFORNIA, Respondent.	)

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied. The petition was filed 30 days after the time limit set forth in Rule 20.1 of the Supreme Court rules. Furthermore, many of the issues presented in the current petition have been rejected by this Court when it denied a previous petition. (Harris v. California, No. 80-6702.) Finally, all of the issues presented here are currently pending before the Ninth Circuit Court of Appeals on petitioner's appeal from the denial of federal habeas corpus relief by the United States District Court for the Southern District of California. Thus, there is no need for this Court to exercise its discretion in favor of petitioner.

* * * * * *

ARGUMENT

SINCE THE PETITION WAS FILED 30 DAYS LATE, AND PETITIONER HAS ALL OF THESE ISSUES CURRENTLY PENDING BEFORE THE NINTH CIRCUIT ON HIS APPEAL, THERE IS NO REASON FOR THIS COURT TO EXERCISE ITS DISCRETION IN FAVOR OF PETITIONER

This is California's lead death penalty case. After petitioner's judgment was affirmed on direct appeal to the California Supreme Court (People v. Harris (1981) 28 Cal.3d 935) he petitioned this Court for a writ of certiorari, which petition was denied. (Harris v. California, No. 80-6702.) Harris has petitioned every level of the California courts for habeas corpus relief, without success. As indicated on page 6 of his petition the California Supreme Court denied his petition for habeas corpus on January 13, 1982. An execution date of March 16, 1982, was set, and on March 5, 1982, petitioner filed a voluminous petition for writ of habeas corpus in the United States District Court for the Southern District of California. The District Court ordered a written response from the State of California, and after a hearing held March 12, 1982, summarily denied the petition. That decision was appealed to the Ninth Circuit Court of Appeals which ordered an expedited briefing schedule. The briefs have now been filed, and oral argument before the Ninth Circuit is calendared for May 11, 1982.

The above sequence of events demonstrates all the reasons why this Court should deny the petition for writ of certiorari. First of all, the petition is not timely. Rule 20.1 of the Supreme Court rules requires such a petition to be filed within 60 days of the order by the state's highest court. That order was January 13, 1982. (Petn. p. 6.) Yet, the petition for writ of certiorari was not filed in this Court until April 12, 1982, almost a month late. No explanation for this tardiness

accompanied the petition. We note that it was filed in this Court exactly a month after the denial of habeas corpus in the District Court of the Southern District of California. Thus, we urge that this Court should reject the petition as having been untimely filed.

Furthermore, the issues raised herein are not new. Several of them have already been considered, either directly or tangentially in the previous petition for writ of certiorari which this Court denied last October. (Harris v. California, No. 80-6702.) Finally, it would seem to be a total waste of time for this Court to exercise its discretion in favor of granting this petition. All of the issues presented herein are currently being presented to the Ninth Circuit Court of Appeals on petitioner's appeal from the denial of habeas corpus in the District Court. (Harris v. Pulley (9th Cir. No. CA 82-5246.) Thus, petitioner may receive a favorable ruling on his issues from that court. At the very least, if he loses there this Court will have another opportunity at that time to review any of his issues which may be found to be substantial. Thus, for this reason too, we urge his petition be denied.

* * * * * *

CONCLUSION

Since the petition for writ of certiorari was filed almost a month too late, and presents only issues which are currently pending before the Ninth Circuit Court of Appeals, the petition should be denied.

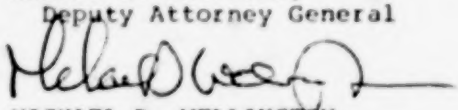
Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General

ROBERT H. PHILIBOSIAN, Chief Assistnat Attorney General--Criminal Division

DANIEL J. KREMER,
Assistant Attorney General

HARLEY D. MAYFIELD,
Deputy Attorney General



MICHAEL D. WELLINGTON,
Deputy Attorney General

Attorneys for Respondent

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

AFFIDAVIT OF SERVICE BY MAIL

No. 81-6512
ROBERT ALTON HARRIS v. CALIFORNIA

SHERRY L. COSSIO, being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 110 West "A" Street, Suite 600, San Diego, California 92101; that on the 10th day of May, 19 82, affiant enclosed one true copy of the within

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA: an original and 10 copies to Michael Rodak, Jr., Clerk, U.S. Supreme Court, Washington, DC 20543

in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States Mail at the City of San Diego, County of San Diego, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed.

That all parties required to be served have been served as shown below:

Michael J. McCabe, Esq.
108 Ivy Street
San Diego, CA 92101

Keenan G. Casady, Clerk
Court of Appeal
Fourth District, Division One
1350 Front Street., Room 6010
San Diego, California 92101

Laurence P. Gill, Clerk
California Supreme Court
350 McAllister St., Rm. 4050
San Francisco, CA 94102

Robert D. Zumwalt, Clerk
County of San Diego
220 West Broadway
San Diego, California 92101

Edwin L. Miller, Jr.
San Diego District Attorney
220 West Broadway, Suite 700
San Diego, California 92101

Sherry L. Cossio

Subscribed and sworn to before me this 10th day of May, 1982.

Vida M. Allen
NOTARY PUBLIC in and for the County of San Diego, State of California.

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1982

SD CL-3 (11/78)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-6512

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ROBERT ALTON HARRIS,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

REPLY TO OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL J. McCABE
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108 Ivy Street
San Diego, California 92101

Telephone: (714) 231-1181

Attorneys for Petitioner
ROBERT ALTON HARRIS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-6512

ROBERT ALTON HARRIS,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

REPLY TO OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARGUMENT

THE PETITION FOR WRIT OF CERTIOPARI WAS FILED IN A TIMELY FASHION

While this reply may be unnecessary because of the action of the Clerk of this Court in filing the petition for writ of certiorari in this case, it is offered because the underlying judgment attacked in the petition is one imposing the death penalty.

Respondent contends in his opposition that Rule 20.1 of the Rules of this Court requires that a petition for writ of certiorari be filed within sixty days of the order of the state's highest court [Opposition page 2]. He asserts that since the order denying petitioner's application for writ of habeas corpus in the California Supreme Court was January 13, 1982, his petition filed in this court on April 12, 1982, was

almost a month late. Respondent, however, has apparently misread the Rules of this Court. Rule 20.1 addresses only the time limit for filing petitions for writ of certiorari in criminal cases. Since the instant petition is from the denial of habeas corpus relief by the California Supreme Court, an action deemed civil in nature, the applicable time limit for the filing of such a petition is contained in 28 U.S.C. §2101(c). That statute specifically indicates that petitions for writ of certiorari from civil judgments must be filed within ninety days of the entry of the order denying relief as to which reveiw is sought. Thus, the petition was filed in a timely fashion.

It is petitioner's understanding that this Court treats habeas corpus petitions as being civil in nature. There are sound policy reasons for this as it relieves the Court of the enormous burden of researching the law of each state to determine the manner in which the state treats such petitions.[1/]

However, if petitioner's counsel has erred in interpreting the applicable rules and has filed his petition in a tardy manner, he requests the Court to disregard the error in the interests of justice. The sixty day time limit is not jurisdictional and does not bar this Court's exercise of discretion to consider

---

1. For example, although petitions for writ of habeas corpus in California are frequently filed in collateral attacks upon criminal judgments, the use of the petition is not limited to criminal cases. See, e.g., In Re Michael E., 15 Cal.3d 183 (1975), [Determination of rights of prisoners]; In Re van Geldern, 5 Cal. 3d 832 (1971), [Inmate-author's right to royalties]. Moreover, the California Supreme Court has noted in In Re Saunders, 2 Cal. 3d 1033, 1047 (1970):

> "The traverse, and the petition, where . . . it is treated as a traverse [citation], are analogous to the answer in a civil proceeding . . . ."

Thus, the pronouncements of the California Supreme Court are not crystal clear in this area. This Court should and does control its own docket. For this reason alone the action of the Clerk in filing the petition should not be overturned.

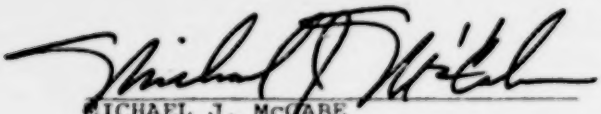
the case. See Taglianetti v. United States, 394 U.S. 316 n.1, cited in Stern & Gressman, Supreme Court Practice (5th Ed. 1978) pp. 390-391.

* * * * * * * * *

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari in the above-entitled case was filed in a timely fashion.

Respectfully submitted,



MICHAEL J. McCABE
SAVITZ & McCABE
Attorneys for Petitioner
ROBERT ALTON HARRIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

AFFIDAVIT OF SERVICE BY MAIL
No. 81-6512
ROBERT ALTON HARRIS v.
CALIFORNIA

MICHAEL J. McCABE, being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 108 Ivy Street, San Diego, California 92101; that on the 24th day of May, 1982, affiant enclosed one true copy of the within REPLY TO OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA; an original and 10 copies to Michael Rodak, Jr., Clerk, U. S. Supreme Court, Washington, D. C. 20543 in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited same in the United States Mail at the City of San Diego, County of San Diego, State of California, with postage thereon fully prepaid; that there is delivery service by United States mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed.

That all parties required to be served have been served as shown below:

Michael D. Wellington
Deputy Attorney General
Office of George Deukmejian
Attorney General of California
110 West A Street, Suite 700
San Diego, California 92101

Laurence P. Gill, Clerk
California Supreme Court
350 McAllister St. Rm. 4050
San Francisco, CA 94102

Michael J. McCabe

Subscribed and sworn to before me
this 24th day of May, 1982.

Alice Elinor Tumminia
ALICE ELINOR TUMMINIA
Notary Public

OFFICIAL SEAL
ALICE ELINOR TUMMINIA
NOTARY PUBLIC - CALIFORNIA
Principal Office in San Diego County
My Commission Exp. Aug. 6, 1982